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EARLY DAYS OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

By JOB BARNARD.

(Read before the Society, January 15, 1918.)

The early part of the year 1863 found this District in a greatly disturbed condition by reason of the Civil War. That struggle had not then reached its high-water mark in the fierce battle of Gettysburg; President Lincoln's emancipation proclamation had just been made; there were many foes of the administration at home and abroad; and those who were charged with the responsibility of conducting the civil and military affairs of the nation, felt the necessity of having strong and tried men in every important position, executive, legislative, and judicial.

The Circuit Court of this District established under the Act of February 27, 1801 (2 Stat. L. 103) was then the court of general jurisdiction. It was composed of three judges, Chief Judge James Dunlop, and assistant judges, James S. Morsell and William M. Merrick.

There was a separate court for the trial of criminal cases, in which Thomas H. Crawford was judge. He was sick and unable to hold court from November, 1862, to January 26, 1863, when he died. Because of his illness and death the criminal cases, of which there were then a great many, were tried by one of the judges of the Circuit Court, in addition to the cases of a civil character with which that court was then burdened. Judge Morsell had been on the bench about forty-eight years, and was practically superannuated; and there-

fore the trials of civil and criminal cases all fell upon two men, Chief Judge Dunlop and Judge Merrick.

There was no method of appeal from the judgments of this court, except directly to the Supreme Court of the United States. The condition of the personnel of the court, and the crowded condition of the dockets, became the subject of inquiry in Congress, and an act was prepared to reorganize the courts in this District; and after earnest debate, the same became a law on March 3, 1863. (12 Stat. L. 762.)

There was no charge of disloyalty to the Government made against either of the judges of the old Circuit Court, and they might have been nominated for judges of the Supreme Court of the District of Columbia, created by said act, if the President had deemed it wise to nominate them; but at that particular time he considered it of the utmost importance that there should be a court in the national capital composed of judges of national reputation, with positive and strong convictions in accord with the policies of the administration on all questions then disturbing the country. The said act abolished the Criminal Court, and the Circuit Court, and transferred all the business, and the jurisdiction of both these courts, to the new court to be organized; and the President was left in freedom to nominate such men for judges as he might deem advisable.

Under this statute, Mr. Lincoln, on March 11, 1863, sent to the Senate, then holding an extra session, the names of four men selected by him to constitute the new bench, all of whom were well known to the country to be strong, conservative, and loyal to the administration.

Three of these men had been members of Congress and one was a local man.

David K. Cartter, of Ohio, was named to be chief justice, and Abraham B. Olin, of New York, George P. Fisher, of Delaware, and Andrew Wylie, of the District of Columbia, associate justices, the statute using these titles to designate the judges, instead of the titles of chief judge and assistant judges, which were used in the act creating the old circuit court.

Chief Justice Cartter had been one of the delegates from Ohio to the Republican convention held in Chicago in 1860, and his influence and vote secured the four votes from Ohio to be changed from Mr. Chase to Mr. Lincoln, which gave him a majority on the third ballot. Before the result of that ballot had been announced, it was known by those who kept tally, that Mr. Lincoln had $231\frac{1}{2}$ votes out of a total of 465, and needed one ballot and a half to constitute a majority. While the tellers were adjusting the count, and before the announcement was made Cartter sprang upon a chair and announced a change of four votes from Ohio, from Chase to Lincoln, the Ohio delegation up to that time having voted solidly in each of the three ballots taken for Chase. This change of vote giving Mr. Lincoln a majority, other delegates announced changes of their votes, until when the result of the vote was finally announced by the chair, the number had reached 364, and as soon as the applause that followed permitted, Mr. Evarts from New York, who spoke for Mr. Seward and for the New York delegation, moved to make the nomination unanimous, which was carried with wild applause (2d volume, *Life of Abraham Lincoln*, by Nicolay & Hay, 275).

Justice Olin was a member of the 37th Congress, which expired on March 3, 1863, and had charge of the bill in the House, authorizing the draft to fill the quotas in the Army, which became a law on the last day of that

Congress. He had not only earnestly advocated that bill, but had, by his service in other matters, greatly strengthened the legislation in support of the prosecution of the war, and of the various policies of the administration.

Justice Fisher was also a member of the same Congress, and he had been active in support of important administration measures, and also in endeavoring to have Mr. Lincoln's scheme for compensated emancipation adopted by the State of Delaware, a scheme somewhat similar to that which finally became a law applicable to the District of Columbia, and which resulted in the emancipation of the slaves in this District on April 16, 1862. The Delaware legislature was to pass a law abolishing all the slaves then owned in that State, in ten annual installments, or 180 slaves a year, there being 1,800; and Congress was to pass an act giving Delaware bonds for \$900,000, without interest, payable in ten annual installments as the slaves became free, this being \$500 per head. Bills were prepared and submitted embracing this scheme, but they failed to pass.

Justice Wylie resided in Alexandria, Virginia, at the time of the election of President Lincoln, and had been known to be an avowed Republican; and he was the only man in the city of Alexandria who voted for Mr. Lincoln. His open avowal of his political principles had subjected him to threats that he would be shot if he voted for Mr. Lincoln, and after the election he was fired upon by some one while sitting on his porch, the bullet striking and breaking a glass which he held in his hand, and shortly after that he removed from Alexandria to Washington.

The following editorial appeared in the "Evening Star" of March 11, 1863, and shows the peculiar conditions then existing in this District:

“THE DISTRICT JUDICIARY.

“This forenoon the President we know sent to the Senate the nominations of the following gentlemen to compose the United States Bench for this District, viz: Hon. D. K. Cartter, of Ohio, C. J.; Hon. A. B. Olin, of New York; Hon. G. P. Fisher, of Delaware, and Judge Wylie of our late criminal court.

“In making these appointments it is evident that the President was influenced by considerations growing for the most part out of the anomalous condition of the District affairs, arising from the war, for which the country is indebted to secession.

“The nation at large never had so deep a stake in the affairs of the District of Columbia as at this time, necessarily far overshadowing any local considerations whatever in the judgment of the Executive. The country holds him responsible that the administration of justice here shall tend, past peradventure, to conserve the Government's hold upon the District and the border States, as the means of ultimately compelling the obedience of the rebellious States to the laws.

“Under the existing condition of affairs here, therefore, it is by no means strange that in making these appointments he should have sought nominees known well to the whole country having this momentous stake involved, rather than gentlemen of this community, who however well known and confided in at home, are unknown to the country in connection with the troubles of the times.

“The gentlemen nominated, with the exception of our fellow-citizen Judge Wylie, have all served in Congress, where the interests of the District never had warmer friends than they were.

“Their competence is all that our public could ask, while we may not inappropriately add that all are conservative.

“Under these circumstances we sincerely believe their selection to be the subject of congratulation to this community.

“Some of our fellow-citizens doubtless have preferred others on personal grounds, but personal considerations should not and could not safely be permitted to influence the President's

actions in such a case. It is not to be expected that those not sincerely and thoroughly loyal at heart will approve this executive action, but as that which would please them would, of course, tend to endanger the safety of the State, it matters nothing whether they are pleased or not.

“It is to be presumed that the Senate will at once confirm the nominations in question.”

These nominations were confirmed by the Senate on March 12, but the confirmation of Mr. Justice Wylie was reconsidered, and as to him, the extra session adjourned without further action.

The Senate adjourned on March 13, and on March 18 the President commissioned Mr. Justice Wylie as a recess appointment, and he was qualified with the others, and they first met in the city hall, now the United States courthouse, to organize the new court on March 23, 1863.

The first official act of the court was to appoint Return J. Meigs clerk, who gave bond as such in the sum of \$2,000, the bond being approved by the justices, and the oath of office was administered to him by the chief justice.

Thereupon they ordered all the record books, papers, and files appertaining to the old circuit, district, and criminal courts of the District of Columbia to be placed in the custody of the clerk.

They also ordered that the clerk make a roll of the proctors, solicitors, attorneys, and counsellors of the Supreme Court of the District of Columbia, embracing therein the names of such proctors, solicitors, attorneys, and counsellors, of the District of Columbia, as shall before him subscribe and take the oath that the said justices have subscribed and taken—that is to say, the oath prescribed by the act of Congress entitled, “An act to prescribe an oath of office, and for other

purposes," approved July 2, 1862. This was called in those days the "iron-clad oath."

They also ordered a special term of the court to be held on the first Monday of April, for the trial of criminal cases; and that a grand and petit jury be selected and notified to attend at that time. And thereupon their first meeting was adjourned.

A number of the attorneys took the said oath, and were entered upon the roll of attorneys of the new court on the same day.

Justice Fisher was assigned to hold the criminal court for the April term, and proceeded to the trial of numerous criminal cases that were then waiting to be heard.

On May 4, 1863, the first regular session of the court met in general term, and caused a memorandum of the meeting on March 23 to be recorded and made part of the proceedings of the court in general term, by being then approved; and on that day the court ordered that the rules of practice of the late courts of the District of Columbia be continued in force for regulating the proceedings of this court, so far as the same are applicable thereto, until further order.

In addition to the order providing a bar, made on the 23d of March, the court ordered that applicants for admission may be admitted either by special order of the court, or after examination by a committee of the bar, to be appointed from time to time; and, thereupon, Thomas J. D. Fuller and George Tucker, were, on motion, admitted to the bar.

William Redin, Joseph H. Bradley, and Michael Thompson were appointed a committee to examine applicants, and, on their report, filed the same day, Robert B. Caverly and Meigs Jackson were admitted.

The court then ordered a special term to be held,

commencing on the second Monday of May, for the trial of all such matters of a civil nature, not requiring a jury, as appertained to the jurisdiction of this court at a special term; and that a special term be held, commencing on Tuesday, the 14th day of May, for the trial of crimes and offenses arising within the District of Columbia, and for the delivery of the jail of said District, and ordered a grand and petit jury for that term; and also ordered, for the trial of all matters of law requiring a jury, and matters at law and in equity appertaining to the jurisdiction of this court, a special term to be held, commencing on Monday, June 1, and that a jury be selected and notified to attend said term.

William Redin, Joseph H. Bradley, Walter D. Davidge, R. H. Gillett, and the clerk of the court were appointed a committee to prepare rules of practice for the several courts.

Henry Baldwin, Peter H. Watson, — — Whiting, Charles Mason, Joseph J. Coombs, and the clerk were appointed a committee to prepare rules of practice in patent cases, and William Redin was appointed auditor in chancery.

The appointment of Hester L. Stevens, previously made at the special term of the court for criminal business, as commissioner in admiralty, was confirmed, and he was appointed such commissioner.

The court in general term continued to meet from day to day, admitting aliens to become naturalized as citizens, and doing such other business as came before it.

On May 8, 1863, Andrew Hall, a person of color, under the age of twenty-one, came, by his next friend, John C. Underwood, and filed a petition for a writ of habeas corpus, averring that he was unlawfully dis-seized of his liberty and imprisoned in the common jail

of the District, in custody of Ward H. Lamon, marshal, and the writ was immediately granted, requiring the marshal to have the body of said Hall before the court on the next day at 10 o'clock; and at that time the marshal produced the body, and made his return, from which it appeared that the said Hall had been arrested by virtue of a warrant issued by direction of Mr. Justice Wylie, on the petition of George W. Duvall, of George, a citizen of Prince George's County, Maryland, filed April 20, 1863, in which he had set forth that the said Andrew Hall, and two other negroes named, had absconded from him, and were fugitives from service and labor due and owing to him, and that they were then in the District of Columbia.

Thereupon the case was argued by John Dean and John Jolliffe, as attorneys for the relator, and by Walter S. Cox and Joseph H. Bradley, attorneys for the claimant, the argument lasting several days.

On the 13th, the court ordered a reargument, which was had on May 21; and on the 22d, the court announced that it was equally divided, two of the justices holding that the relator ought to be discharged from arrest, and the other two being of the opinion that he is subject to arrest and delivery to his master, under the fugitive slave law. The court therefore denied relief under the writ of habeas corpus, and remanded Hall to the custody of the marshal, to be by him safely kept until the further order of the justice who had ordered his arrest, Mr. Justice Wylie.

It appears that thereupon Mr. Justice Wylie discharged him, and his attorneys were afterwards indicted, charged with having, with force and arms, hindered and prevented said Duvall from arresting and seizing said Hall; and also charged with unlawfully seizing, carrying away, and rescuing said Hall from

the custody and control of said Duvall, his master; and with assisting and abetting said Hall to escape from the custody and control of said Duvall, they well knowing the said Hall to be a fugitive from service and labor from the State of Maryland.

This case is No. 362 on the criminal docket; but it appears that no trial was ever had, and the case was nolle prossed on February 23, 1864.

It will be remembered that the emancipation proclamation, signed by President Lincoln, on January 1, 1863, only applied to those States and parts of States that were then in rebellion against the United States, which did not include any part of Maryland.

The right to hold slaves in Maryland not having been affected thereby, slavery continued in that State until it was abolished by the new Constitution which was adopted in October, 1864.

The case of Hall was not the only one where the Supreme Court of the District of Columbia was called upon to arrest fugitive slaves from Maryland, and to restore them to their masters, there being fifteen others for which warrants were issued by direction of Justice Wylie, or Justice Fisher, from April 14 to April 20, 1863.

The Hall case, however, seems to be the first case of importance to be argued before the new court, and it was of such great interest that each of the judges delivered an opinion therein. These are reported in Volume 6, District of Columbia Reports, page 10.

Chief Justice Cartter and Justice Fisher were of the opinion that the court had power to execute the fugitive slave law; and for that reason they were disposed to remand the petitioner to the marshal, for the purpose of restoring him to his master; but Mr. Justice Olin, and Mr. Justice Wylie thought that the fugitive

slave law was not applicable to the District of Columbia, and that there was no statutory authority in this court to assist the owners of fugitive slaves in securing their property.

Being equally divided, the matter was left as it was before the argument, and Justice Wylie, entertaining the views that he did, directed the relator to be discharged. When Hall was on his way out of the courthouse, after such discharge, Mr. Duvall seized him by the collar, and his friends interfered, and he was again taken before Justice Wylie, and counsel asked to have Mr. Duvall punished for a contempt of court. Justice Wylie intimated that he could not permit Hall to be seized in the manner in which it had been represented to him that he had been seized, while in the courthouse; but there seems to have been no further action taken for the alleged contempt, and later it appears that Mr. Dean also seized Hall, holding him by the collar, to prevent him from being taken by force by Mr. Duvall.

This contention caused so much disturbance that Mr. William B. Webb, then chief of police, came to the courthouse with other officers to protect Hall, and to prevent a further conflict *vi et armis*, took him to the station house for safe keeping.

The provost marshal, Major Sherburne, sent men under the command of Lieutenant Baker to the station house for Hall, and Mr. Webb turned him over to the military authorities, and later Mr. Webb, Mr. Duvall, and Mr. Bradley went to the provost marshal to find out what had been done with him and were told that he had been sent to the contraband camp to be held there until Major-General Hitchcock, who was then commissioner for exchange of prisoners, could hear the matter next day and say what ought to be done with him.

The second grand jury, summoned for the May term, was composed of the following citizens: Henry Naylor, foreman; James S. Casparis, Thomas B. Brown, William H. Forrest, J. W. Fitzhugh, Thomas Purcell, George A. W. Randall, Robert H. Graham, Horatio E. Berry, John H. Russell, J. T. K. Plant, A. H. Paul, John D. Boyd, William Richards, John Corcoran, John A. Peake, James Wallace, A. G. Pumphrey, and R. W. Fenwick.

A special report made by them at the close of their services on June 10 (volume 1, page 242, of the Minutes of the Criminal Court), shows the bad condition of affairs existing at that time in this District. It says there were then retained indefinitely in the jail many persons by reason of witnesses having absconded, or having been sent off with the Army, or for other causes, and it suggests that a careful canvass of the jail docket be made, and that an attempt be made to obtain witnesses in every case to be brought before the next grand jury, because it says the magnitude of the evil and suffering caused in this way is so great that immediate efforts should be made to render the same better.

It also states that the number of petit cases which ought to be disposed of by the city magistrates, but which are brought up to the grand jury, is legion, and it suggests remedies for that condition.

It further states that the city is full of colored servants, who are ignorant of law, and the penalty attaching to crime, and who are committed for theft, and that the jail is not sufficient to hold the great numbers daily committed.

It suggests the necessity for a house of refuge, or reform school, to which boys can be sent; and it calls attention to other evil conditions which affected the

young and verdant soldiers from inland towns of the different States of the country.

The criminal cases, as shown by Criminal Docket No. 1, which were tried during the first months of this new court, were not different in character from those usually tried in criminal courts, save a few who were indicted for procuring soldiers to desert, for aiding and abetting rebellion, for rescuing fugitive slaves, or for treason.

The clerk began a new series of numbers for the cases in the different branches of the court, which series has continued to the present time.

Abraham Baldwin Olin, son of Gideon Olin, was born in Shaftsbury, Vermont, in 1808. He graduated at Williams College in Massachusetts in 1835; studied law, and was admitted to the bar in Troy, New York, in 1838, of which city he was recorder for three years. He was elected to Congress as a Republican from the Troy district, and took his seat December 7, 1857; and he was reelected, and continued in Congress until March 3, 1863. He remained upon the bench until January 13, 1879, when he retired. He died in Washington City, July 7 of the same year.

On the occasion of his retirement from the bench, fifty of the active and prominent members of the bar sent a letter to him; and on the occasion of his death, a meeting of the bench and bar adopted appropriate resolutions, which letters and resolutions will be found in Volume 3 of MacArthur's Reports.

The esteem in which he was held by the bar is expressed by them in these words:

"During the long term that you have been a member of the court your learning and ability, your almost intuitive perception of right, your enthusiastic love for justice, your broad and comprehensive understanding of legal and equitable prin-

ciples, and your veneration for authority and precedent have done much to give stability to the judgments of the court and have illustrated your eminent fitness for the position which you have occupied.

“During the whole of your service upon the bench our personal relations have been of the kindest character, and our respect for you as a judge has always been associated with the most sincere regard for you as a man.”

The reports in which Justice Olin’s opinions appear are the MacArthur Reports, 3 volumes, and the 6th and 7th D. C. Reports, prepared by Franklin M. Mackey, volume 6 embracing those cases reported from the organization of the court in 1863 to November 19, 1868, and Volume 7 containing cases decided from February, 1869, to February, 1872, inclusive.

Let me quote briefly from one of Justice Olin’s opinions, *In re Poole*, 2 MacArthur, 593.

In this case he discharged a boy from custody of the marshal under a writ of habeas corpus, and made these general remarks :

“The first great canon for human conduct is, *be obedient to law, human and divine*; and the next one is, *mind your own business*. Those who are actuated by *benevolence prepense*, are sometimes as troublesome in this world, as those actuated by *malice aforethought*.” (No. 11031 at Law, decided in 1876.)

George Purnell Fisher was born in Milford, Kent County, Delaware, October 13, 1817. He attended St. Mary’s College, Baltimore, one year, and then went to Carlisle, Pa., and graduated from Dickinson College in 1838. He studied law and was admitted to the bar in 1841. From 1857 to 1860 he was attorney-general for the State of Delaware; and he was elected to the 37th Congress from that State, and remained there until the

close of his term, March 3, 1863. He continued on the bench until April, 1870, when he was appointed by President Grant, as Attorney of the United States, for the District of Columbia, succeeding General Edward C. Carrington.

His opinions as judge, which have been reported, are all contained in Volumes 6 and 7, D. C. Reports.

Mr. Justice Fisher sat in the trial of John H. Surratt, and during that trial, for use of language, and objectionable conduct which he held to be in contempt of court, he passed an order striking the name of Mr. Joseph H. Bradley, one of the attorneys for the defendant, and a leading member of the bar, from the roll of attorneys of the criminal court.

A bitter controversy grew out of this, and Judge Fisher was sued for damages by Mr. Bradley, the case being decided against the plaintiff, and affirmed by the court in general term, a report of which will be found in Volume 7, D. C. Reports, page 32.

The case was then taken by writ of error to the Supreme Court of the United States, and there affirmed by that court. It is reported in 80th United States (13 Wallace), page 335.

Before this case was heard in the Supreme Court of the United States, the Supreme Court of the District of Columbia, in general term, had required Mr. Bradley to show cause why he should not be disbarred from that court, and on his answer, had made an order striking his name from the roll of attorneys of the Supreme Court of the District of Columbia. He then applied to the Supreme Court of the United States for a writ of mandamus, to compel the Supreme Court of the District of Columbia to restore him to the office of attorney and counselor, from which he alleged he had been wrongfully removed by the said court, on November 9, 1867.

To that petition the Supreme Court of the District of Columbia made return and the matter was heard and the writ ordered to issue, the reason alleged in the opinion by Mr. Justice Nelson being that the alleged contempt was committed in the criminal court, which was a separate court from that of the Supreme Court of the District of Columbia, under the terms of the said act of March 3, 1863, although held by one of its judges; and that, therefore, the Supreme Court of the District of Columbia acted without jurisdiction in removing Mr. Bradley from its bar, for misconduct in the criminal court. The case is reported in 7th Wallace, 364.

Congress interposed to make the organic act more explicit, and by act of June 21, 1870 (16 Statutes at Large, 160), it was provided that the special terms of the circuit courts, the district courts, and the criminal courts, authorized by the said act of March 3, 1863, "which have been or may be held shall be, and are declared to be, severally, terms of the Supreme Court of the District of Columbia."

On receipt of the writ of mandamus from the Supreme Court of the United States, the Supreme Court of the United States, the Supreme Court of the District of Columbia passed an order (1st Minutes General Term, 323), rescinding the order striking Mr. Bradley's name from the roll of attorneys; and at the same time, by virtue of its power to make rules, adopted a rule as follows:

"No attorney or counsellor who has heretofore been or may hereafter be suspended from practice or dismissed from the bar by the order of either of the courts organized by said act (March 3, 1863), for contempt of court or professional misconduct, shall be allowed to practice in any other of said courts so long as such order shall remain in force."

Thereafter Mr. Bradley made several attempts to be reinstated, claiming that the rule was *ex post facto* as to him; and after much consideration, and by an opinion recorded in the minutes of the general term, the court indicated that his remedy would be to make an apology and seek an order in the criminal court setting aside the order disbarring him there before the court in general term would undertake to allow him to practice in the other branches of the court. He refused to pursue that course, and so the court, by express order, made the said rule applicable in his case, and his disbarment was continued for a number of years. He was reinstated in his rights at the bar on motion of Thomas J. Durant on September 28, 1874, shortly after the death of his son, Joseph H. Bradley, Jr. (2 M. G. T., 352).

Justice Fisher remained in his office of United States Attorney for the District of Columbia until he was succeeded by Henry H. Wells, and thereafter he resided in this District and in Delaware. He was First Auditor of the Treasury Department during President Harrison's administration. He died in this city on the 10th day of February, 1889, in his eighty-second year.

Andrew Wylie was born at Connorsburg, Pa., February 25, 1814. His father was president of Washington University in Pennsylvania, and when he was a lad his father moved to Bloomington, Ind., and became president of the Indiana State University.

Judge Wylie graduated at Bloomington, and then went to Lexington, Ky., where he studied law, and attended the Transylvania University. He wanted to settle in the south, but his father was opposed to having him go to a slave State, so he went to Pittsburgh, and entered the office of Walter Forward, then the leader of the bar of that city, and who was afterwards

Secretary of the Treasury. He was admitted to the bar and began his practice in Pittsburgh and was elected a member of the city council, and in 1845 was the city attorney. On March 6, 1845, he married Miss Mary Caroline Bryan, of Alexandria, Va., a relative of the Barbour family, of Virginia, and a sister of Thomas B. Bryan, of Chicago, a former Commissioner of this District. Ten days after his return from his wedding the great Pittsburgh fire occurred, which swept away about one-third of the city. He then went to Indiana, and after remaining there a short time returned to Pittsburgh, and finding business there much disturbed came to Washington City and was admitted to the bar of the old circuit court on February 19, 1849. He resided, however, in Alexandria City, Va., until after the election of President Lincoln in 1860.

Shortly before the 3d of March, 1863, through the influence of his friends, Edwin M. Stanton, Secretary of War, and Henry S. Lane, Senator from Indiana, President Lincoln nominated him for the position of judge of the criminal court, to succeed Judge Crawford. Before his confirmation by the Senate, the criminal court was abolished, and the Supreme Court of the District of Columbia provided for, and his nomination was made as one of the justices of that court.

He remained on the bench from March, 1863, until May 1, 1885, when he retired at the age of seventy-two years.

He sat in the second trial of John H. Surratt, for the murder of President Lincoln, when the defendant was acquitted.

Judge Fisher sat at the first trial, when William B. Todd was foreman of the jury, which failed to agree and was discharged.

Justice Wylie issued a writ of habeas corpus for

Mrs. Surratt, but the return was made that the writ was suspended by order of the President, Andrew Johnson; and Mrs. Surratt was executed, without having an inquiry under the writ, she having been convicted by a military court.

Judge Wylie's first commission is dated March 18, 1863; but after he was confirmed by the Senate, he received a second commission bearing date January 20, 1864 (1st M. G. T., 46).

The opinions delivered by Justice Wylie, so far as reported, are all contained in the first ten volumes of the District of Columbia Reports, ending with 4th Mackey.

The bar adopted resolutions expressive of their feelings when he resigned, and they are found in 4th Mackey.

He died August 1, 1905, at his home in Washington City, in his ninety-second year.

Memorial services were held in the old circuit court room, at which Mr. Justice Hagner presided, and Mr. Nathaniel Wilson read a sketch of his life, showing his ability and courage as a judge and the appreciation in which he was held by the bar. This paper and an account of the proceedings will be found in Volume 33 of the Washington Law Reporter, page 803.

Judge Wylie sat upon the equity bench more than any other judge during his term. He was also frequently assigned to hear appeals. His independent mind on legal matters often prevented him from being able to agree with the majority of the court when he sat in the general term, so that we find him dissenting in a number of cases. He was the last survivor of the original court, although Chief Justice Cartter remained upon the bench longer than any other.

David Kellogg Cartter was born in Rochester, N. Y.,

June 22, 1812. His father was a carpenter, and he died when David was only 10 years old. The lad learned to be a printer, beginning the trade under the instructions of Thurlow Weed. He afterwards studied law with an older brother and was admitted to the bar in Rochester in 1834. He married Miss Nancy H. Hanford, of Scottsville, N. Y., July 6, 1836. They removed to Akron, Ohio; afterwards to Massilon, and later to Cleveland, in all of which places he was engaged in the practice of the law.

He was elected to Congress as a Democrat in 1849, and remained in Congress until March 3, 1853. He was appointed by President Lincoln as Minister to Bolivia, S. A., in March, 1861.

He was chief justice of this court from March 11, 1863, until his death, April 16, 1887, in the seventy-fifth year of his age.

Resolutions adopted by the bar upon his death will be found in 5th Mackey, which is the last volume in which any of his reported opinions are found.

During his incumbency in office the Supreme Court of the District of Columbia had been increased to six members, Justice MacArthur having been appointed as the fifth justice, July 15, 1870, under act of June 21, 1870 (16 Statutes at Large, 160); and Justice Cox having been appointed as the sixth justice, March 1, 1879, under act of February 25, 1879 (20 Statutes at Large, 320). The said act of June 21, 1870, abolished the orphan's court and added its jurisdiction to the Supreme Court of the District of Columbia.

Chief Justice Cartter was a man of great strength of mind, imbued with a strong sense of justice; and he had through his life been a great reader, although in his later years he read much less than formerly. He had quaint and original ways that naturally attracted

attention. His personal appearance was remarkable. He had a leonine face, roughly marked by smallpox. He had a noticeable impediment in his speech, generally stopping in the middle of a word, which seemed to give force to his utterances rather than to detract from them.

The members of the bar who practiced before him, will no doubt readily recall many of the peculiar words of his vocabulary. The word "supervene" was one that he frequently used in his opinions.

Chief Justice Cartter had an active mind as well as an original one. He obtained several patents for inventions, one of which, obtained in November, 1876, was for a ventilating device for windows, etc. It is the device that he had put in operation in the windows of the courthouse, its object being to provide a constant current of fresh and pure air through the room without the irregular drafts and currents attendant upon open doors and windows. This device consists essentially of a ventilating chamber or casing permanently located between the frame and sash of the window, opening downward into the external air, and upward into the interior of the room, and which can be opened and closed by a rod at the side of the window.

In January, 1879, he obtained letters patent on a car-truck for street-railways, the device consisting in having an independent axle for each wheel of the railway car, journaled in a swiveling-box at the outer end, and journaled in a box mounted in curved guides at the inner end, the whole scheme being an invention to obviate the difficulties attendant upon turning curves with cars on street railways.

About the same time he also took out letters patent on an improvement in coverings for beds, the object of which was to support the coverings of a bed, so that

they would not come in immediate contact with the person, and the improvement was intended to alleviate the conditions of the sick and debilitated, so that they could be made more comfortable, and could be more conveniently treated.

Mr. James L. Norris was his attorney in securing these patents.

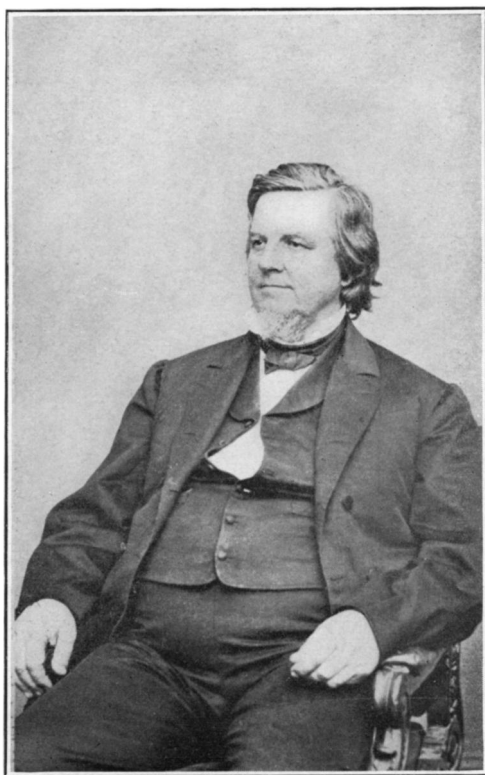
Chief Justice Cartter met with a sore loss while he was Minister to Bolivia, in the death of his youngest son, David K. Cartter, Jr., who was a member of the Second Ohio Infantry. He died at Fort Scott, Kans., August 12, 1862, of typhoid fever. He was a young man about twenty-one years of age, and had been with his father previously in Bolivia. This loss so affected him that it was said to be the moving cause for resigning his position as minister and his return to Ohio.

A peculiar duty which Chief Justice Cartter performed was that of administering the oath of office to the cabinet ministers. It is said that he had sworn in all of the cabinet ministers, from the time of his appointment as chief justice of his court up to and including Robert T. Lincoln and the other members of the cabinet of President Garfield in 1881.

He was on intimate terms with many of these cabinet officers, including Seward, Stanton, Fish, Chandler, and Grant, and was recognized by them as a valued adviser.

With such men as Senators Wade, and Chandler, and the war leaders of Congress, he held a close relation to Mr. Lincoln.

He was frequently called upon to preside at mass meetings of citizens in the District of Columbia, one notable occasion being the meeting at Lincoln Hall, on January 20, 1880, to consider measures for the relief of the suffering poor of Ireland. On that occasion the



DAVID K. CARTER,
Chief Justice Supreme Court Dist. Col., March 11, 1863—April 16, 1887.

hall was crowded, and among those on the platform were Senators Thurman of Ohio, Kernan of New York, Jones of Florida, Samuel J. Randall, Speaker of the House of Representatives, Representatives Benjamin Butterworth of Ohio, J. E. Kenna of West Virginia, G. B. Loring of Massachusetts, Fred Douglass, then marshal of this District, Hon. J. R. Hawley, Mr. A. M. Clapp, W. W. Corcoran, Rev. J. E. Rankin, and many other well-known citizens and officials.

As a specimen of his manner of speaking and thinking, I read his opening remarks at that meeting, as published in the *National Republican* of January 21, 1880.

"Fellow-citizens: After considering my acknowledgments in view of the compliment to myself in calling me to preside over your deliberations, and in view of the fact that the existing distress and personal suffering obtaining in Ireland are more or less complicated with political and property considerations, the relative rights of Ireland as a constituent of the British Empire, and the legal and relative rights of landlord and tenant in the disposition of titles, you will permit me to disavow, on your behalf and for myself, any purpose through the agency of this meeting to influence either of these considerations.

"With us, as a republic, it has become a principle of international action, so often published and uniformly practiced as to become a constitutional tradition, that we will not interfere with the domestic political relations of the nations of Europe nor permit them to interfere with ours. This principle, right in itself, is eminently wise when applied to our peculiar territorial conditions, made inaccessible for purposes of invasion or external violence by the two oceans which stand guard on the east and the west, and possessed between them of all the material elements of comfort. Personally and as a people we are in the condition of absolute independence, and if trouble comes to this people we must borrow it by going abroad or create it within ourselves at home.

“Again, we have no interest in or control over the property relations of the subjects of Great Britain. They may be wrong, and, with reference to the tenure of real estate, they are wrong as viewed by us. Primogeniture and entail are inhibited by our Constitution and discouraged by the genius of all our institutions. Nevertheless, the inviolability of titles and the sacred character of contracts are watched with as much jealousy by our institutions and people as any nation on the globe, and it is eminently proper it should be so.

“The fee simple titles and a home are within the reach of every man having health, industry, and economy, and when health fails no people are quicker to rescue the unfortunate from want. These homes are indispensable among a free, self-governed people. Inside of these homes are first taught the lessons of authority and obedience, self-reliance and manhood, and in and around them are gathered the guarantees against future want—the providence of the husbandman. Without them and without the title that secures them to the owner would supervene agrarianism and communism not indigenous and as yet unnaturalized in this country.

“I have felt it proper to make this brief disavowal of the purposes of this meeting with a view of promoting its true object. We are assembled to organize the instrumentality of an instant active charity for the relief of the famishing under the supreme law of humanity, which tolerates no discrimination on account of geography, but makes every man our neighbor and brother, and in the case of the appeal now made to us we ought to come to the relief with cheerful good will. The sufferers are largely of our bone and blood, largely identified with our beginning and progress; a people constitutionally hospitable and generous; a people who, under like circumstances, would do to others as they would we should do unto them.”

One who had heard him in the campaign of 1856, when he left the Democratic party and joined the Republican party, says of him that he put into the Fremont campaign all the vigor and energy he possessed.

He stumped Ohio and Pennsylvania with great effect, and was regarded as the best stump speaker in the campaign.

The author had heard him at Franklin, Pa., and again in Meadville, and says that the little impediment or stutter in his speech added greatly to the strength and charm of his words and manner.

(See an article entitled "Celebrities at Home," in *The Republic*, a weekly journal of politics and society, published in Washington, October 30, 1880.)

In 1886, at the opening of the January term of the Supreme Court of the District of Columbia, holding a general term, there were present Justices MacArthur, Hagner, Cox, James, and Merrick on the bench, when the picture of Chief Justice Cartter, painted by Mr. Charles Armor, was presented to the court by Mr. Reginald Fendall on behalf of the bar. In accepting this picture for the court, Mr. Justice MacArthur said that it was a very satisfactory likeness, the features in fine relief, the expression excellent, perhaps a little severe, as if the chief justice was in the act of smashing a frivolous motion. He also said:

"The chief justice had sat there nearly a quarter of a century, and they all knew the extraordinary ability he has shown—perhaps unparalleled—and that when in the future they should look upon this picture they would be reminded of his strong utterances."

His vigorous style of speech was evidently acquired before he came upon the bench, for in Ben Perley Poore's *Reminiscences*, Vol. 1, page 390, the author speaks of Chief Justice Cartter, then a member of Congress, and says that, in criticizing Daniel Webster's action as Secretary of State in negotiating with the Barings, Corcoran & Riggs, and Howland & As-

pinwall drafts in payment of Mexican indemnity money for $3\frac{1}{2}$ per cent. premium, instead of accepting August Belmont's offer to negotiate them for 4 per cent. premium, Justice Cartter used this language:

"I want the House to understand that I take no part with the house of Rothschild, or of Baring, or of Coreoran & Riggs. I look upon their scramble for money precisely as I would upon the contest of a set of black-legs around a gaming table over the last stake. They have all of them grown so large in gormandizing upon money that they have left the work of fleecing individuals, and taken to the enterprise of fleecing nations."

His original manner of speech is illustrated by many anecdotes that are still told of him among the older members of the bar.

Here is one which appeared in the Editor's Drawer in *Harper's Magazine* for September, 1873:

"At a late term of the Circuit Court of the District of Columbia, Chief Justice Cartter presiding, the dignity of the proceedings was quite upset by the following incident:

"A suit was pending in which the plaintiff claimed full contract price for work partially performed, but not finished on account of fraud on the part of the defendant. The defense was that the plaintiff was not entitled to more than quantum meruit, because the defendant enjoyed no benefit from the work. The chief justice, who is troubled with a slight impediment of speech, speedily settled the point by stating, 'If a ma-a-an hired another ma-a-an to r-r-rub him with a br-r-ick, he's g-got to p-pay for it wh-whether he enj-j-joys it or not.'"

Another story is this: An attorney in the trial of a case before him was insisting with great earnestness that there had been an unbroken line of decisions in accordance with his contention for more than a hundred years. The authorities seemed to the chief jus-

tice to be based upon narrow or technical grounds, and not in accordance with his ideas of what was right and just under the facts developed in the case. He stopped the attorney and said to him, "You say that there has not been a decision of any of the courts contrary to your contention, for one hundred years?"

The attorney assured him that such was the fact.

Then the chief justice said: "Don't you think it is about time there was one?" and then added: "There is going to be one in about five minutes."

The attorney was so taken back by the intimation from the bench, that he suspended his argument, and the line of decisions was at once broken by the ruling of the chief justice.

On one occasion I remember to have heard him deliver a brief oral opinion in general term, in a judgment creditor's suit. The bill had been filed some twenty years before, seeking payment from the equities which the judgment defendant then had in certain real estate which was covered by mortgages or deeds of trust, securing bona fide debts greater than the value of the land. The complainant did not prosecute his suit further than to file his bill, have process served, and an answer filed, showing the actual incumbrances. The case then slept until in the course of time the mortgages were discharged, and the property had been conveyed to other parties; and when an owner, who knew nothing of the *lis pendens*, was about transferring his title, a diligent title examiner found the suit still undisposed of, and reported it as a possible objection. The solicitor for the complainant, on being reminded of the case, undertook to proceed with it, and obtained a decree which would have taken an innocent purchaser's title from him if enforced. The owner, who had been made a party defendant, took an ap-

peal, and the chief justice, in pronouncing the opinion of the court in general term, reversing the decree and remanding the case with directions to dismiss the bill, said, that "The complainant had allowed the case to sleep so long, that it would be a sin against somnambulism to wake it up now."

Another time I remember a case was being tried before him in which Mrs. Belva Lockwood was the attorney for the personal representative of a decedent. In her argument she became quite earnest, and in a high voice said, that if the court should decide contrary to the principle for which she was contending, the deceased would get up out of his grave to protest against it. At this point, the chief justice raised his hand gently, and said: "Never mind, Mrs. Lockwood, never mind; he won't get out."

It is not, however, for his strong language in speech, or his anecdotes from the bench, that Chief Justice Cartter should be best remembered. It is rather for his love of justice, as expressed in many of his opinions, his strong common sense, his fearlessness in the discharge of his duty, and his efforts to preserve individual liberty.

Among the more important cases heard by him was that of Hallet Kilbourn. Mr. Kilbourn had been summoned before a special committee of the House of Representatives in March, 1876, as a witness, and declined to answer certain questions asked him concerning certain real estate transactions in which it was thought Jay Cooke & Co. had been involved, and also declined to produce certain private papers called for. He was then brought before the House, where he again declined to answer the questions or to produce the papers called for, when he was adjudged to be in contempt and was arrested by the sergeant-at-arms by direction

of the House of Representatives and imprisoned in the jail of this District.

After Mr. Kilbourn had refused to answer questions and to produce papers before the committee the Speaker, under the provisions of sections 102, 103, and 104 of the Revised Statutes of the United States, had certified the fact to the District Attorney, who was then Henry H. Wells, and an indictment had been found against him, which was pending in this court, being No. 11,290 on the criminal docket.

Being confined in jail by the sergeant-at-arms, and awaiting trial on the indictment for the same offense, that of refusing to answer questions or produce papers, Kilbourn filed a petition, No. 11,314 on the criminal docket, for a writ of habeas corpus, and the same was issued by order of Chief Justice Cartter and made returnable before him in chambers.

The petitioner was represented by Jeremiah S. Black, Matt H. Carpenter, Walter D. Davidge, Noah L. Jeffries, Charles A. Eldredge, and Daniel W. Voorhees; and the sergeant-at-arms, or the House of Representatives, was represented by Col. Robert Christy and Samuel Shellabarger.

The arguments on both sides were very able, and lasted for several days. I was then an assistant in the office of the clerk of this court, and at the request of Chief Justice Cartter, who asked me to hear the case and give it my best consideration as a lawyer, I sat in the court room and took notes of the arguments, and prepared for him the statement of the case which appears in the record. He dictated the opinion to me, word for word, as he walked back and forth in the consultation room, and when written out it was annexed to the statement and all published as coming from him. He was not a man, however, to take the credit

for something which he did not do, and a day or two afterward, I heard Judge Shellabarger say to him, that his statement of the case, in this opinion, was a better one than he could have made himself. Chief Justice Cartter promptly disclaimed any part in making the statement, saying that it was all my work. I considered this a great compliment, coming as it did from Judge Shellabarger, whose ability in stating a case was one of the principal elements of his well-earned reputation as a distinguished lawyer.

In this case Chief Justice Cartter had to decide against the judgment of the House of Representatives, in ordering the petitioner to be confined in jail; or he had to pronounce unconstitutional or inoperative the statute which had been passed by both houses of Congress, and approved by the President, providing for the punishment for this character of contempt.

He reached the conclusion, in the able opinion pronounced by him, that the House was wrong in undertaking to punish for contempt contrary and in addition to, the method prescribed by the act of Congress; and he therefore ordered the discharge of the prisoner from the custody of the sergeant-at-arms, and the United States jail, and remanded him to the criminal court for trial.

I think the case was never tried, but Kilbourn brought suit against the sergeant-at-arms, for damages for false arrest, being suit No. 16,288 at law.

To this suit the sergeant-at-arms, the Speaker of the House of Representatives, and John M. Glover, and other members of the special committee, were made defendants.

The sergeant-at-arms justified his action under the Speaker's warrant. The other defendants pleaded the general issue, and justification in special pleas. Kil-

bourn demurred to the special pleas, which demurrer was overruled, and judgment entered for the defendants; and a writ of error was sued out to the Supreme Court of the United States. The case was heard in that court, and the judgment of the Supreme Court of the District of Columbia was sustained as to the Speaker, and other members of the House of Representatives, but was reversed as to Thompson, the sergeant-at-arms; and the speaker's warrant was held to be no defense to the action. *Kilbourn v. Thompson*, 103 U. S., 168.

The case then came on for trial in the Supreme Court of the District of Columbia, and the jury found a verdict for the plaintiff, assessing his damages at \$100,000. The court on motion set this verdict aside because of excessive damages. The plaintiff then amended his declaration and averred special damages.

The case was tried a second time before Mr. Justice Cox, when the jury returned a verdict for the plaintiff for \$60,000, and that verdict was also set aside on the ground of excessive damages.

The case was again tried and a verdict rendered for \$37,500. A remittitur was ordered to be entered of \$17,500 or stand a further new trial. The remittitur was entered and the \$20,000 remaining was paid. See *Kilbourn v. Thompson*, *MacArthur & Mackey*, 401.

During the twenty-four years that Chief Justice Cartter presided in this court there were, beside the three associate justices appointed with him, seven other associate justices, namely, Justice David C. Humphreys, appointed May 13, 1870, as successor to Justice Fisher, resigned; Justice Arthur MacArthur, appointed July 15, 1870; Justice Alexander B. Hagner, appointed January 21, 1879, to succeed Justice Olin, retired; Justice Walter S. Cox, appointed March 1,

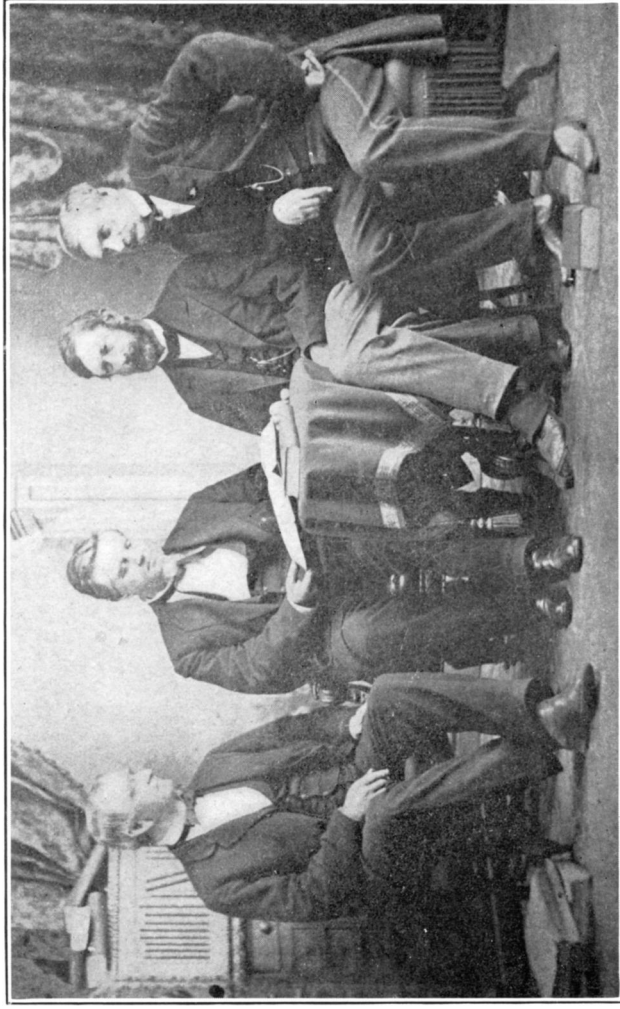
1879; Justice Charles P. James, appointed July 24, 1879, as successor to Justice Humphreys, deceased; Justice Wm. M. Merrick, appointed May 1, 1885, as successor to Justice Wylie, retired; and Justice Martin V. Montgomery, appointed April 1, 1887, as successor to Justice MacArthur, retired.

During these twenty-four years, through the joint efforts of the bench and bar, printed reports of many of the decisions of this court were secured. The attorneys organized the Law Reporter Company, and Justice MacArthur, as a work of love, started the reports, they being, as a rule, first published in *The Law Reporter* and then in book form in the MacArthur, the MacArthur & Mackey, and Mackey's Reports.

Previous to the first MacArthur, which was published in 1875, there had been no reports of the opinions of the courts of this District since those of Judge Cranch were brought to a close in 1840, a period of thirty-five years.

If I may be pardoned for another personal remark, I will say that I had some small part in the history of this resumption of the reports. I was an assistant clerk in the court from June, 1873, to June, 1876, and wrote shorthand; and I was frequently called upon by the judges to report their oral opinions delivered in general term, and I assisted Justice MacArthur in getting together many of those which he published in the first volume. In the preface to this volume Justice MacArthur thanks the members of the bar and the clerks for their assistance, and then does me the honor to add: "My thanks are especially due to Mr. Barnard for numerous transcriptions of his shorthand notes of oral opinions."

Of all the officers connected with the court, when it was first organized, none remain except four of the



THE SUPREME COURT OF THE DISTRICT OF COLUMBIA AS CONSTITUTED MARCH 11, 1863.
(Reading from left to right, Justice Wylie, Chief Justice Carter, Justice Olin and Justice Fisher.)

members of the old bar, namely, Wm. F. Mattingly,¹ Nathaniel Wilson, Eugene Carusi, and Samuel L. Phillips.

During these twenty-four years the court witnessed three bloodless revolutions in the government of this District, and the futile efforts of Logan U. Reavis to have the capital removed to St. Louis. It saw the last mayor and common council and witnessed the abolition of the city governments of Washington and Georgetown and of the levy court; it saw the experiment of voting for a delegate in Congress and members of the District legislature, and the administration of two governors, and it saw the beginning of the government by Commissioners. It heard the city groan under the weight of its own inertia, and then saw it spring forward toward its present beauty, and wealth, and comfort under the herculean energies of Governor Shepherd and his co-workers.

It saw the excitement and sorrow attending the assassination of two Presidents—Lincoln and Garfield; and one of its members, Justice Cox, tried the assassin, Guiteau, and he was executed under the warrant of the court.

During this time the Bar Association of this District was organized, and the accumulation of its valuable library was begun. In this time, too, the court, through the efforts of Chief Justice Cartter, secured the appropriation and had the addition or new part built to the courthouse, which is now the north half of the building.

During these twenty-four years the Supreme Court of the District of Columbia did much to advance the cause of good order and good government, not only for this District, with its steadily increasing population, but for the nation at large.

¹ Died at Washington, D. C., Oct. 7, 1918.—Ed.

Its broad jurisdiction and its location at the nation's capital, brought before its judges many important causes, such as could not have arisen in other courts, either State or Federal. It was clothed with all the common law powers of the State courts, and all the statutory powers of the United States circuit and district courts.

On the death of Chief Justice Cartter, a meeting of the bench and bar was called, at which Mr. Justice Wylie presided, and at which resolutions were adopted, expressing the esteem in which he was held. These will be found in Volume 15 of *The Washington Law Reporter*, 245-247. In the same place will also be found a record of the announcement of his death by Mr. Worthington, then United States District Attorney, in the court in general term; and the remarks of Mr. Justice Hagner at that time, from which I quote a few sentences; and they seem appropriate in closing this sketch, as Justice Hagner became the last survivor of the ten associate justices who sat upon the bench with Chief Justice Cartter.

Justice Hagner said of him, among other things, that "he possessed a mind of great breadth and vigor, and of rare acuteness; with a faculty of perceiving with rapidity and clearness those points in a cause which he considered decisive of the real questions involved. His opinions, which were always pronounced extemporaneously, were couched in language peculiarly characteristic of the qualities of his mind and disposition, original in style, frequently sententious and epigrammatic, always striking, sometimes abounding in quaint humor; there was rarely absent from his deliverances some sentence or expression that would fix itself upon the attention and be carried away in the memory of those who listened. And whatever he said

was delivered in a voice and with a manner so animated and impressive that communicated an interest to discussion that might have otherwise been dull and unattractive. Nature had bestowed upon him a massive form and striking physiognomy, a highly expressive countenance, and an aspect intelligent, almost leonine, in its strength.

“It is with Chief Justice Cartter in his sphere as a member of this court that we may appropriately speak of him. There were other relations in which, as a public man, the country at large knew him well. As a lawyer long in full practice, as a legislator in the halls of Congress, as holding a high diplomatic position, and as the associate of prominent men in trying times, he filled a conspicuous place in the history of his time. He will long be remembered in this community, where he lived so long, and especially by the members of the bar, who knew him so well, and could best appreciate his mental endowments and his great natural gifts.”